83-1142
NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

COSMAR COMPANIA NAVIERA, S.A.,
AND
THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED

PETITIONERS,

VERSUS

SYMEON SYMEONIDES, Curator of FRANGISKOS HAJIGEORGIOU

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a foreign corporate defendant, consistent with considerations of choice of law and forum non conveniens as applied in an admiralty context, is required to disclose detailed information concerning its stockholders, officers, directors, beneficial owners and all other persons associated with the corporation (Argument No. I, below)

2. Whether the state courts of Louisiana erred in not giving effect to a previous determination of a federal court on the issues of choice of law and forum non conveniens where the federal determination, although involving a different plaintiff, involved the exact fact setting and incident as was involved in the present case (Argument No. I, below)

3. Whether the state courts of Louisiana erred in a maritime personal injury action brought by the representative of survivors of a foreign seaman for injuries occurring on a foreign flag vessel in refusing to consider whether foreign law applied and whether forum non conveniens dismissal was appropriate as a discovery sanction for failure to provide irrelevant information (Argument No. II, below)

4. Whether the state courts of Louisiana erred in refusing to consider the effect of forum selection and choice of law provisions in a Greek seaman's employment contract, where the contract was pursuant to and in accordance with a collective bargaining agreement between the seaman's Greek labor union and a Greek shipowner.

STATEMENT OF INTERESTED PARTIES

The parties having an interest in the outcome of this case, pursuant to rule 21.1(b) of the Rules of the Supreme Court, are listed as follows:

1. Cosmar Compania Naviera, S.A.
2. Celestial Navigation Corp.
3. The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited
4. Symeon Symeonides
5. Evangelina Hajigeorgiou
6. Georgis Hajigeorgiou
7. Panayiotis Hajigeorgiou
8. Evangelos Hajigeorgiou

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COSMAR COMPANIA NAVIERA, S.A.

Petitioner,

versus

SYMEON SYMEONIDES, Representative of the Estate of FRANGISKOS HAJIGEORGIOU

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL, FIRST CIRCUIT,
STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

Petitioner, Cosmar Compania Naviera, S.A., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, First Circuit, State of Louisiana, entered on this proceeding on May 17, 1983.

OPINIONS BELOW

The Louisiana State District Court rendered oral opinion and the Court of Appeal rendered written opinion. The Louisiana Supreme Court, without written reasons, denied petitioners application for a writ of certiorari. The District Court and Court of Appeal decisions and the denial of

petitioner's writ by the Louisiana Supreme Court are set forth in Appendix. The opinion of the Court of Appeal is published. *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281 (La. App. 1st Cir. 1983). The denial of petitioner's writ application to the Louisiana Supreme Court has not been published at the time of this writing.

JURISDICTION

The judgment of the Court of Appeal, First Circuit, State of Louisiana was entered on May 18, 1983 (Appendix C). A timely Petition for Rehearing was filed with the Court of Appeal, which was denied on June 29, 1983 (Appendix B). Petitioner then timely filed a Petition for Writ of Certiorari with the Louisiana Supreme Court which was denied on October 17, 1983 (Appendix A). The petition to this Court is filed within ninety (90) days of the denial of petitioner's application for writ of certiorari submitted to the Louisiana Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

TEXT OF AUTHORITIES INVOLVED

Title 46, United States Code, Section 688, commonly known as the "Jones Act", provided:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an

> action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Louisiana Code of Civil Procedure, Article 1458, provides:

> Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within fifteen days after the service of the interrogatories, except that a defendant may serve answers or objections within thirty days after service of the petition upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Article 1469 with respect to any objection to or other failure to answer and interrogatory.

The Louisiana Code of Civil Procedure, Article 1471, provides:

> If a party or an officer, director, or managing agent of a party or a person designated under Articles 1442 or 1448 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Article 1469 or Article 1464, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the

following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

(5) Where a party has failed to comply with an order under Article 1464, requiring him to produce another for examination, such orders as are listed in Paragraphs (1), (2), and (3) of this Article, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

STATEMENT OF THE CASE

On February 2, 1980, while the Greek flag Motor Vessel ISABELLE was moored near Baton Rouge, Louisiana, a mooring line popped, injuring two members of the vessel's crew, Frangiskos Hajigerogiou and Manolis Volyrakis. Both men were rushed to Our Lady of the Lake Medical Center in Baton Rouge. Volyrakis subsequently was released from the hospital and returned to Greece. Hajigerogiou remained in the Baton Rouge hospital until he died on May 30, 1980.

As a result of the incident, two separate lawsuits were filed. Volyrakis filed suit in the United States District Court, Eastern District of Louisiana. Hajigeorgiou, through Symeon Symeonides, a Louisiana State University law professor who had himself appointed Hajigeorgou's curator, filed suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana.

While the Hajigeorgiou matter was pending in state court, the Federal District Court in the Volyrakis matter, based on affidavits submitted by the parties, answers to interrogatories and depositions, granted petitioner's motion to dismiss for forum non conveniens. The information presented to the federal court indicated that none of the owners, directors, or stockholders of the vessel owning company were United States citizens. Detailed information concerning the names, addresses, and other personal data of the parties connected with the shipowning company were not requested or required by the federal court. The District Court's foreign non conveniens dismissal was affirmed by the United States Court of Appeals for the Fifth Circuit. *See Volyrakis v. M/V ISABELLE*, 668 F.2d 863 (5th Cir. 1982) (reproduced in Appendix "E")

During the course of proceedings in state court in the Hajigerogiou case petitioner filed pleadings seeking dismissal for forum non conveniens or, alternatively, seeking to enforce the forum selection clause in the contract of maritime employment entered into between the decedent and petitioner (R.II, 206-12). The decedent's employment agreement adopted as the controlling law the collective bargaining agreement negotiated by the Greek seamen's union of which the decedent was a member, and the law of Greece (R. II, 189-94). In petitioner's state court pleadings, the application of Greek law was urged in the event the State Court refused to dismiss the case (*Id.* 208-10). Plaintiff served on defendants a set of interrogatories containing 197 questions, many with multiple parts. Pertinent to this writ application are Interrogatories No. 19 and 20 (R.I., 35, 37).

INTERROGATORY NO. 19

> State the full names, residence addresses, and citizenships of all stockholders, officers, and directors of the record owner, charterer, manager, and operator of the vessel at the time of the accident sued on, if any of these stockholders are corporations, state the names, residence addresses, and citizenship of each and every stockholder in such corporations, and further state the names, residence addresses, and citizenship of each and every stockholder in such corporations, and further state the names, residence addresses, and citizenship of each and every stockholder in such corporations, and further state the names, residence addresses, and citizenships of each and every stockholder in subsequent corporations owning stock in such corporation until the ultimate ownership of the record owner of the vessel involved herein, and its manager,

charterer, and operator, is finally traced to individual stockholders, stating the names, individual residence addresses, and citizenships of each such individual stockholders.

INTERROGATORY NO. 20

If the beneficial interest in the stock of the record owner, manager, charterer, and operator of the vessel in the corporations owning stock in the record owner, manager, charterer, and operator of the M/V ISABELLE is not in the record owners of said stock, state the full names, residence addresses, and citizenships of the persons who have the ultimate beneficial interest in the stock of the record owner, manager, charter, and operator of the M/V ISABELLE or in the corporations owning stock in the record owner, manager, charterer, and operator of the M/V ISABELLE at the time of the accident sued on.

Petitioner filed a joint response to these two interrogatories (R.I, 60-66):

RESPONSE NO. 19

The stockholders, officers, and directors of the Cosmar Compania Naviera are all non-U.S. citizens. Defendants have no other information concerning the charterer, manager and operator.

Plaintiff objected to this answer on the grounds that it was incomplete; it did not give the names and residence addresses of all the officers, stockholders and directors (R. I, 213-14). In response to this objection, petitioner supplemented its answer as follows (R. I, 156):

> Cosmar Companie (sic) Naviera, S.A. is solely owned by Micofo Anstalt Va Duz, Va Duz Lichstenstein. The Anstalt is controlled by two trustees in Zurich, Switzerland.

In addition to the answers to this interrogatory, petitioner, in conjunction with the filing of the pleadings urging the forum selection clause, the choice of law and forum non conveniens defenses, attached the affidavit of Mr. Liverios Sterghiou, Secretary and Cashier of the Board of Directors of Cosmar Compania Naviera, S.A. Mr. Sterghiou's affidavit established that all of the directors and officers of the company were Greek, and that the company had no United States citizens as stockholders or officers (R. II, 177, 178-86). Also attached was the affidavit of Mr. Sotar Kapolistrias, Master of the M/V ISABELLE, which established that the owner of the ISABELLE was petitioner (R. II, 187). The names and business addresses of the officers and directors of Cosmar were given separately to counsel for plaintiff. Thus the alleged non-disclosed information was the beneficiaries of the Anstalt.

The state District Court struck petitioner's defenses of forum non conveniens and the application of Greek law without giving either oral or written reasons (R. II, 325). However, a minute entry on May 28, 1982, indicates that the court's action was prompted by failure to answer fully Interrogatories No. 19 and 20 (R. I, 2).

Before the trial of the case in chief, petitioner sought supervisory writs from the Louisiana Court of Appeal, First Circuit, which were denied. Petitioner then sought writs from the Louisiana Supreme Court which were also denied. In the writ application, petitioner raised the forum non conveniens, forum selection, and application of law

questions noted in the district court.

Trial on the merits commenced on June 21, 1982, with the state court applying the General Maritime Law of the United States and the Jones Act. At trial petitioner again raised the defense of application of Greek law (R. IV, 323-328). The court, noting that it had already ruled on the matter, allowed petitioner to proffer the testimony of its Greek law witness with its Greek law exhibits (*Id.*).[1]

After judgment was rendered against petitioner by the state trial court, petitioner appealed to the Louisiana Court of Appeal, First Circuit, raising as error, *inter alia*, the actions of the trial court in precluding petitioner from raising its defenses of the application of Greek law and of forum non conveniens, and the failure of the state court to give effect to the forum selection clause contained in the decedent's contract of employment.

The Louisiana Circuit Court of Appeal, on May 17, 1983, for written reasons assigned, affirmed the ruling of the trial court striking the defenses. *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281 (La. App. 1st Cir. 1983) (Appendix "C"). The gist of the court's ruling was that the striking of the defenses was justified as a discovery sanction, as the information sought was discoverable and relevant. The court held that the Louisiana discovery sanction provisions were similar to the Federal Rules of Civil Procedure, and that this Court's opinion in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites De Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72

[1] The court accepted into evidence deposition testimony of plaintiffs which showed that plaintiffs had no U.S. contacts and their sole allegiance was to Greece. The District Court apparently chose to ignore this evidence.

L.Ed.2d 492 (1982) justified imposition of the sanction. The Louisiana Court of Appeal denied petitioner's application for rehearing (Appendix B).

Petitioner filed an application for a writ of certiorari seeking review of these issues before the Louisiana Supreme Court. On October 17, 1983, that court denied petitioner's application (Appendix A).

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED TO RESOLVE THE INCONSISTENCIES BETWEEN THE FIFTH CIRCUIT AND THE STATE COURT CONCERNING THE SCOPE OF RELEVANT INFORMATION NECESSARY TO DETERMINE A FORUM NON CONVENIENS MOTION IN AN ADMIRALTY CONTEXT WHERE THE PERTINENT FACTS ARE IDENTICAL

Despite the fact that the federal courts, the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit, previously had decided the exact same issues involving the very same fact setting based on the same information provided in the state court, the state court struck the defenses of forum non conveniens and application of Greek law. While the state trial court record is vague with regard to the state court's reasons for ruling, the state intermediate appellate court affirmed the district court's ruling as justified in view of petitioner's failure to fully provide all information sought by Interrogatories No. 19 and 20.[2]

[2] There is some question as to the real reason for the state court's refusal to consider petitioner's defenses. Although a minute entry of

The purpose of the plaintiff's inquires was to determine whether petitioner had a "base of operations" in the United States. See *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970). The state courts erred in precluding petitioner from asserting its defenses of forum non conveniens and the application of Greek law. Petitioners provided plaintiff and the state trial court with more than sufficient information for decision of the question.

The initial answer to Interrogatories No. 19 and 20 disclosed that Cosmar Compania Naviera was the owner of the ISABELLE and that all of its officers, directors and stockholders were non-U.S. citizens. Previous information provided to plaintiff and to the trial court in support of pleadings raising the forum non conveniens defense disclosed that the directors and officers of the company all were Greek. (R. I, 177-86) When plaintiff was dissatisfied with this response, petitioner went further to disclose that all of the stock was owned by a Lichtenstein entity controlled by two trustees in Switzerland. All of this information, provided to plaintiff and the trial court, was under oath. The

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(Footnote 2 continued)
May 28, 1982 (R.I, 2) and the state intermediate court attributed the trial court's decision to petitioner's refusal to fully answer the interrogatories, the trial court has never, either orally in court or in writing, assigned formal reasons for its ruling. Although not reflected by the record, the trial court's demeanor throughout these proceedings indicated its intent to try the case under United States law regardless whether the interrogatories were fully answered. Although petitioner's argument is based on the reasons for denial as set forth in the state appellate court decision, petitioners do not waive their right to review of what it believes was the arbitrary refusal of the state court to consider maritime law with regard to choice of law and the doctrine of forum non conveniens.

answers to interrogatories, as required by Louisiana law,[3] were answered under oath. The affidavit information was also under oath. There was no objection or question as to the veracity of information.

A state court deciding issues in a claim subject to admiralty and maritime jurisdiction is bound to apply maritime law as would a federal court deciding the same issue. *Chelentis v. Luckenbach Steamship Co., Inc.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918). In accordance with this established principle, the state appellate court properly recognized that the law of forum non conveniens was a part of the maritime law, which was to be applied in state court as if the case were brought in federal court. *Symeonides v. Cosmar Companies Naviaera, S.A.*, 433 So.2d 281, 284-85. The state court erred, however, in failing to follow federal law, particularly that of the Fifth Circuit in *Volyrakis*, with regard to the extent of information necessary to the issue of forum non conveniens.

In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258-59, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), this Court decided that submission of detailed information was unnecessary for the decision of a dismissal motion based on forum non conveniens. At issue in *Piper* was whether the parties were required to provide detailed affidavits identifying witnesses before the district court would consider the question. This Court noted that such detail was not necessary, as it would defeat the purpose of the forum non conveniens motion:

> It is suggested that defendants seeking forum non conveniens dismissal must submit affidavits

[3] The text of La. Code of Civ. Pro. art. 1458 appears at p. 3, *supra*.

> identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary. Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive identification would defeat the purpose of their motion. Of course, defendants must provide enough information to enable the District Court to balance the parties' interest.

Id., 454 U.S. at 258. The thrust of the Court's holding was that detailed information was not necessary; a requirement that such information must be provided would defeat purpose of the forum non conveniens motion. The parties were only required to submit to the District Court sufficient information for decision of the issue.

The federal courts in the *Volyrakis* case were provided with essentially the same information produced in the state court. The Fifth Circuit correctly ruled that petitioner's forum non conveniens motion appropriately was granted by the federal district court. *Volyrakis, supra*, 668 F.2d at 867. Implicit in the Fifth Circuit decision is the fact that sufficient information was provided to decide the forum non conveniens issue. The fact that none of the officers, directors or stockholders of petitioner were United States citizens was all that need be disclosed. *See Volyrakis, supra*, 668 F.2d at 867. Despite the *Volyrakis* ruling, and despite this Court's ruling in *Piper*, the state courts refused to consider the forum non conveniens issue as a "discovery sanction" for failing to answer interrogatories.

The action of the Louisiana state courts is expressly contrary both to this Court's ruling in *Piper* and the ruling

of the Fifth Circuit in *Volyrakis*, even though *Volyrakis* previously decided the same issue and involved the identical fact setting presented in this case.

Issuance of a writ of certiorari is appropriate to review the actions of the state court, which are inconsistent with the maritime law of forum non conveniens.

II.

THE WRIT SHOULD BE GRANTED TO REVIEW THE CORRECTNESS OF THE STATE COURT'S REFUSAL TO CONSIDER THE APPLICATION OF FOREIGN LAW AS GOVERNING THE MARITIME PERSONAL INJURY CLAIM OF THE RESPONDENT

Both before and during trial and on appeal, counsel for petitioner urged that the proper law to be applied was the law of Greece. As noted in the memoranda and briefs submitted by counsel for petitioner to the state courts, as well as in the opinion of the Fifth Circuit in the *Volyrakis* case, 668 F.2d at 866-68, the choice of law factors set forth by this Court in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and in *Hellenic Lines, Ltd., v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970), strongly favor the application of Greek law. The Fifth Circuit noted in *Volyrakis:*

> In the present case, the *Lauritzen* factors strongly favor the application of Greek law. The vessel sails under the Greek flag, Volyrakis [and Hajigeorgiou] is a Greek citizen, Cosmar is a Panamanian corporation owned and managed by Greeks, a Greek forum is not inaccessible, and the contract of employment selected Greece as the forum for resolution of all disputes arising out of

> the employment relationship. That the injury occurred in United States waters is the sole factor in favor of applying United States law. This fact alone is not enough.

Volyrakis, 668 F.2d at 867 [Parenthetical added]. The Fifth Circuit further commented that under the facts of this case, there was no United States base of operations. That the vessel periodically visits United States ports, and that the vessel was in a United States port when the accident occurred were found insufficient to support the application of United States law to this case. *Id.*, 668 F.2d at 867-69. The Fifth Circuit held that Greek law was the law which should be applied.

The state appellate court did not disagree with the federal circuit court's analysis of the *Lauritzen-Rhoditis* choice of law factors. *Symeonides*, 433 So.2d at 287. Rather, it refused to consider the issue. It found that the state District Court's actions in barring petitioner's forum non conveniens and choice of law defenses was justified as a discovery sanction. The state appellate court noted that the Louisiana provision authorizing discovery sanctions, La. Code of Civ. Procedure Art. 1471, was similar to Federal Rule of Civil Procedure 37(b). *Id.*, 433 So.2d 285. The state appellate court then relied upon this Court's opinion in *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) as providing justification for the imposition of the sanction. *Id.* In *Ireland*, this Court upheld the District Court's actions finding personal jurisdiction where the defendant failed to submit to discovery directed to the issue of jurisdiction. Upon analyzing the *Ireland* factors in light of the facts of the present case, the state appellate court found the District Court's discovery sanction

appropriate. *Symeonides, supra*, 433 So.2d at 286-88.

Petitioner's application for a writ of certiorari should be granted for several reasons. First, as is set forth in the previous argument[4] the information which petitioner did not provide was irrelevant to consideration of the choice of law and forum non conveniens issues. Sufficient information had already been disclosed under oath for decision of the issues.[5]

Disclosure of any further information regarding the stockholders would not change the fact that none of these parties were United States citizens and that the vessel did not have a United States base of operations. The non-disclosure which provided the basis for the state court's discovery sanction was irrelevant; the sanction was imposed contrary to maritime law of forum non conveniens as it required unnecessary detailed disclosure as to irrelevant facts.

Second, unlike *Ireland* where the information sought to be discovered was dispositive of the jurisdictional question presented before the court, the information in the present case was not dispositive of either the choice of law or the forum non conveniens questions.

In *Ireland*, at issue was whether the defendant had sufficient contacts with the forum to be subject to the court's jurisdiction. When the defendant refused to provide this information, the District Court held that business contacts establishing jurisdiction were deemed admitted. *Id.*

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[4] See pp. 10-14, *supra*.

[5] Information provided *under oath* revealed that the corporate owner of the M/V ISABELLE was a Panamian Corporation; all of the officers, directors, and shareholders were of foreign nationality.

456 U.S. at 699. The information which was sought was necessarily determinative whether or not jurisdiction existed. Arguably, the Court's sanction was justified.

In the present case, however, the issues to be decided were choice of law and forum non conveniens, not jurisdiction. This Court has held in *Lauritzen* and *Rhoditis* that there are at least *eight factors* to be considered in the choice of law determination. *Rhoditis, supra*, 398 U.S. at 308-09.[6] The detailed information sought regarding persons associated with petitioner, namely the names, addresses, citizenship, etc., of its stockholders and trustees, has possible relevance to only *one* of the *eight Lauritzen-Rhoditis* factors, namely, the petitioner's base of operations. While petitioner maintains its previously advanced position that sufficient information was submitted for determination of the base of operations factor, even if such was not the case, the state courts exceeded all precepts of maritime law and fundamental fairness in totally barring consideration of its forum non conveniens and choice of law defenses, where the information in question related to only one choice of law/forum non conveniens factor.

Arguably, it *may* have been appropriate for the state court to assume as an established fact that the beneficial owners of Cosmar stock were based in the United States. Base of operations is the only *Lauritzen-Rhoditis* factor to which the requested information was arguably relevant. However, that factor alone is not dispositive.

[6] Assuming that foreign law is applicable, there are several additional factors to consider in determining whether to decline or accept jurisdiction. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

Even if one, or even two, of the *Lauritzen-Rhoditis* factors favor the application of United States law, where the remaining factors overwhelmingly weigh in favor of the application of foreign law, as they do in this case, *see Volyrakis* (Appendix E), application of United States law is inappropriate. As this Court has recognized, the various factors determining choice of law must be weighed in light of the interest of the nation in applying its law and in asserting its jurisdiction. *Rhoditis, supra,* 398 U.S. at 308-309.

The federal courts have recognized that the mere fact that a foreign vessel owner has a United States "base of operations" is not alone determinative of the application of United States maritime law. *Vaz Borralho v. Keydril Co.,* 696 F.2d 379, 389 (5th Cir. 1983); *Chiazor v. Transworld Drilling Co., Ltd.,* 648 F.2d 1015, 1018 (5th Cir. 1981) *cert. denied,* 455 U.S. 1019 (1982); *Phillips v. Amoco Trinidad Oil Co.,* 632 F.2d 82, 88 (9th Cir. 1980), *cert. denied. sub nom, Romilly v. Amoco Trinidad Oil Co.,* 451 U.S. 920 (1981); *Alcoa Steamship Co., Inc. v. M/V NORDIC REGENT,* 654 F.2d 147, 152 (2nd Cir. 1980). Beneficial ownership of foreign shipowning companies by United States parties does not by itself weight the scales in favor of dismissal, particularly where the day to day control of the vessel is from the foreign country and not from the United States. *Id.* All the various factors must be considered giving weight to each of them in accordance with the factual circumstances of the particular case. *See Rhoditis, supra.*

The state courts in the present case did no balancing of factors to determine the applicable law. The state courts did not consider the forum non conveniens factors set forth in *Gulf Oil Co. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), which have been deeply embedded in the maritime law. Petitioner arbitrarily was denied its right to

consideration of its defenses under the guise of application of an unduly harsh and clearly in appropriate discovery sanction. The protection of petitioner's rights and interests of uniformity of maritime law justifies the issuance of a writ of certiorari as to this issue.

III.

THE WRIT SHOULD BE GRANTED TO CONSIDER THE CORRECTNESS OF THE STATE COURTS' REFUSAL TO GIVE EFFECT TO THE FORUM SELECTION CLAUSE IN THE CONTRACT OF EMPLOYMENT BETWEEN DECEDENT AND PETITIONER

The contract between decedent and petitioner was executed in accordance with the collective bargaining agreement existing in favor of the Greek seamen's union of which decedent was a member (R. II, 189-94). The contract provided that all disputes were to be resolved in the Courts of Pireaus, Greece. *Id.* Further, it adopted Greek law and the Greek Maritime Labor Contract as the law governing any dispute. *Id.*

Despite the fact that the forum selection clause was urged in the trial court (R. II, 210-11) and in the state appellate court (La. S.Ct. Court Application, 5-8, 127, 218-223) the state courts refused to consider whether the provisions of the contract should be given effect.

The refusal of the Louisiana courts to consider the issue was in violation of established principles of maritime law. This Court, in *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) held that parties to a maritime contract may agree in advance to

submit their disputes to a designated court. Such clauses should be given effect, absent a strong showing that the clause should be set aside. *Id.*, 407 U.S. at 15.

Two terms later, in *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), this Court again held that forum selection clauses and clauses selecting the law to be applied to a dispute between contracting parties should be enforced. In *Scherk*, Alberto-Culver sued Scherk in a United States District Court, despite the agreement between the parties, which provided for arbitration in a European forum. This Court noted that an arbitration agreement was essentially a forum selection clause. *Id.*, 417 U.S. at 519. Strong policy reasons exist for giving effect to forum selection clauses. As the Court noted, discussing *Bremen, supra:*

> We noted that "much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place [where personal or in rem jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." Id., at 13-14.
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> * * *
>
> The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts....We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.*, at 9.

Scherk, supra, 417 U.S. at 518-19.

Other federal courts have held that such clauses in the contracts of foreign seamen should be enforced. *See Dorizos v. Lemos and Pateras, Ltd.*, 437 F.Supp. 120 (S.D. Ala. 1977); *Mihalinos v. Liberian S.S. TRIKALA*, 342 F.Supp. 1237 (S.D. Calif. 1972); *Brillis v. Chandris (U.S.A.), Inc.*, 215 F.Supp. 520 (S.D.N.Y. 1963).

Similarly arbitration agreements in United States labor collective bargaining agreements are ordinarily enforced. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). Indeed, this Court has warned against the application of United States law where foreign law regarding the rights of seamen clearly applies and where the application of United States law may result in adverse international consequences. *McCulloch v. Sociedad National de Marineros de Honduras*, 372 U.S. 10, 21-22, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963). As the Court noted in *McCulloch, quoting from Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208, 226 (1804), " 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains...' " *McCulloch, supra*, 372 U.S. at 21; cf. *Scherk, supra*.

There was no reason for refusing to apply the forum selection clause. Decedent was a Greek seaman belonging to a Greek Labor Union. He signed articles to sail on a Greek vessel. His articles adopted his union contract and the law of Greece as governing any dispute between decedent and petitioner. The effect of the application of the Jones Act and the General Maritime Law of the United States is to eviscerate the contract willingly entered into

by the parties pursuant to the Greek maritime union contract and pursuant to Greek law.

The ISABELLE was not a "flag of convenience" vessel. She flew the flag of one of America's NATO allies. Her crew was Greek; Greek laws applied to her registry, her maintenance and all aspects of protection which a sovereign nation gives to its maritime interests. The extra territorial application of American law by the state court's arbitrary refusal to consider the application of the law and forum contractually selected by the parties, suggest the appropriateness of the issuance of a writ of certiorari to consider the issue.

CONCLUSION

Petitioner suggests that the foregoing three reasons require that this Honorable Court grant a writ of certiorari to the Court of Appeal, First Circuit of Louisiana.

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APPENDIX "A"

THE SUPREME COURT
OF THE STATE OF LOUISIANA

NUMBER 83-C-1723

SYMEON SYMEONIDES, CURATOR OF
FRANGISKOS HAJIGEORGIOU

VS

COSMAR COMPANIA NAVIERA, S.A.,
CELESTIAL MARITIME CORPORATION AND
THE UNITED KINGDOM MUTUAL STEAM
SHIP ASSURANCE ASSOCIATION
(BERMUDA) LIMITED

In Re: COSMAR COOMPANIA NAVIERA, S.A., CELESTIAL MARITIME CORPORATION AND THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED applying for Certiorari, or writ of review, to the court of Appeal, First Circuit, Number 82-CA-0706, from the 19th Judicial District Court, Number 235,894, Parish of East Baton Rouge.

October 17, 1983

Denied.

HTL
JAD
PFC

A-2

WFM
JLD
FAB
JCW

Supreme Court of Louisiana
October 17, 1983

Clerk of Court
For the Court

APPENDIX "B"

COURT OF APPEAL, FIRST CIRCUIT,
STATE OF LOUISIANA

No. 82 CA 0706

Parish of East Baton Rouge

SYMEON SYMEONIDES, REPRESENTATIVE OF THE ESTATE OF FRANGISKOS HAJIGEORGIOU

vs.

COSMAR COMPANIA NAVIERA, S.A., ET AL

On Application For Rehearing.

Rehearing DENIED

Baton Rouge, Louisiana June 29, 1983

Covington, J. (Signed)

Lanier, J. (Signed)

Alford, J. (Signed)

Filed June 29 1983

Clerk *Judges*

I HEREBY CERTIFY THIS DOCUMENT WAS MAILED TO:

John deGravelles, Paul Due', John Caskey, Havard Scott, Harvey Gleason & Kenneth Servay, Attys.

/S/ KAREN WEST
Dep. Clerk of Court

APPENDIX "C"

STATE OF LOUISIANA

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

NUMBER 82 CA 0706

SYMEON SYMEONIDES, REPRESENTATIVE OF THE ESTATE OF FRANGISKOS HAJIGEORGIOU

VERSUS

COSMAR COMPANIA NAVIERA, S.A., ET AL

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, THE HONORABLE FRANK FOIL, JUDGE PRESIDING.

BEFORE: COVINGTON, LANIER AND ALFORD, JJ

ALFORD, J.

This is an appeal from a judgment of the Nineteenth Judicial District Court, Parish of East Baton Rouge, awarding damages for the wrongful death of a Greek seaman who was fatally injured on a Greek vessel moored in an American port at the time of the accident. Symeon Symeonides, initially as court appointed curator and later substituted as succession representative for decedent's estate, filed suit under the Jones Act and general maritime law. Named as defendants were Cosmar Compania

Naveria, S.A. (owner of the vessel), Celestial Maritime Corporation (American agent of the vessel), and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited (insurer of the vessel).

The decedent, Fragiskos Hajigeorgiou, a citizen of Greece, was hired in Greece as a seaman for the M/V ISABELLE and joined the vessel in Baltimore, Maryland, on January 9, 1980. The record in this case reflects that the M/V ISABELLE is a Greek flag vessel, owned by appellant Cosmar, a Panamanian corporation. Cosmar in turn is owned by Micofo Anstalt Va Duz Liechtenstein, a Liechenstein corporation. The vessel had been purchased in either December, 1979, or January, 1980, and proceeded, after repairs, to port at Darrow, Louisiana (the site of the accident) to take on a cargo destined for Rotterdam. The ISABELLE was the only vessel owned by Cosmar at that time.

In the early morning hours of February 2, 1980, Frangiskos Hajigeorgiou was assisting in releasing the stern mooring lines of the ISABELLE as she was being prepared to leave anchor in the Mississippi River at Darrow, Louisiana. Decedent and Second Officer Manolis Volyrakis, who was in charge of the stern operation, were suddenly hit by a mooring line which slipped, injuring both. The men were taken to the Our Lady of The Lake Hospital in Baton Rouge. Decedent remained in the hospital for some 118 days until his death on May 30, 1980. Second Officer Volyrakis was subsequently released. For reasons to become apparent later in this opinion, we note that Volyrakis filed suit in federal district court, which suit was eventually dismissed on the ground of forum non conveniens. *Volyrakis v. M/V ISABELLE*, 668 F.2d 863 (5th Cir. 1982).

Appellants maintain that the trial judge erred (1) in not transferring venue to Greece, (2) in imposing the sanctions of striking their exceptions of improper venue, lack of jurisdiction, and their defenses under Greek law, (3) in not applying Greek law, (4) in awarding excessive damages, (5) in allowing the deposition of Second Officer Volyrakis into evidence, and (6) in not finding decedent contributorily negligent.

Shortly after this suit was filed, appellants removed the case to the United States District Court for the Middle District of Louisiana. Appellee subsequently filed a motion to remand the matter back to the Nineteenth Judicial District Court, Parish of East Baton Rouge. The motion was granted on August 12, 1980. *Symeonides v. Cosmar Compania Naveria, S.A.*, 494 F.Supp. 240 (M.D. La. 1980).

We note at the outset that appellants do not contest what they term overall jurisdiction, which we take to mean subject matter jurisdiction, in that the vessel owner was conducting business within the navigable waters of Louisiana when the accident occurred.

Prior to answering appellee's petition, appellants filed exceptions of improper venue and lack of jurisdiction. Appellants maintained that the court did not have what they styled Jones Act jurisdiction over the persons of defendants. It is apparent from the exceptions that appellants were urging that the court decline jurisdiction over the matter based on a forum non conveniens argument.

In support of the exceptions, appellants submitted the affidavit of Liverios Sterghiou, Secretary and Cashier of the Board of Directors of Cosmar, which contained a copy of decedent's employment contract, along with

various other documents. In his affidavit, Mr. Sterghiou stated, among other things, that no stockholders or officers of Cosmar were U.S. citizens.

The exceptions were set for hearing on July 17, 1981, the same day as appellee's first motion to compel answers to interrogatories propounded on November 5, 1980. At the conclusion of the hearing, the trial judge overruled appellants' exceptions without giving reasons and granted appellee's motion to compel. Appellants were ordered to answer the interrogatories on or before September 1, 1981. Appellants maintain that the trial judge erred in overruling the exceptions when the above mentioned affidavit established that no American interest was involved in Cosmar. We disagree and note several problems in this argument.

First, when a vessel owner, such as Cosmar, asks the court to decline jurisdiction, it subjects itself to the obligation of furnishing all information pertinent to a decision of the motion. *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971). Second, in *Blanco v. Carigulf Lines*, 632 F.2d 656, 658 (5th Cir. 1980), the Fifth Circuit observed that:

> "Plaintiff is not required to rely exclusively upon a defendant's affidavit for resolution of the jurisdictional issue where that defendant has failed to answer plaintiff's interrogatories specifically directed to that issue. To hold otherwise would permit an advantage to a defendant who fails to comply with the rules of discovery."

The pertinence of the information sought in appellee's interrogatories numbers 19 and 20 are at the

forefront of the dispute in this case. Through these two interrogatories, appellee sought to discover the names, addresses and citizenships of the ultimate beneficial ownership interests of Cosmar and others involved with the ISABELLE. When the interrogatories were finally answered, appellants' combined answer stated, "The stockholders, officers, and directors of the Cosmar Compania Naveria are all non-U.S. citizens. Defendants have no other information concerning the charterer, manager, and operator." After considerable delay, the answer was supplemented to read, "Cosmar Compania Naveria, S.A. is solely owned by Micofo Ansalt Va Duz Leichenstein (sic). The Anstalt is controlled by two trustees in Zurich, Switzerland."

Appellants maintain that these responses adequately answer the inquiry given that the information is without relevance under the United States Supreme Court case of *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254(1953). It appears to this court that what appellants are ultimately urging is that the trial judge erred in not transferring the case pursuant to forum non conveniens because, as they contend, he erred under the *Lauritzen* test[1] in determining that American law applied. This all in

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[1] In *Lauritzen*, the Supreme Court noted that the following factors were important in determining whether to apply American or foreign law:

1) Place of the wrongful act
2) Law of the flag
3) Allegiance or domicile of the injured
4) Allegiance of the defendant shipowner
5) Place of the contract
6) Inaccessibility of foreign forum
7) Law of the forum

turn leads to the specification of error dealing with the appropriateness of the sanction imposed which resulted in appellants' exceptions as to venue and jurisdiction and the applicability of Greek law being stricken.

We are of the opinion that the information sought is both relevant and discoverable. In an effort to clarify these issues we note that choice of law factors are relevant to, though not determinative of, whether admirality suits should be dismissed on forum non conveniens grounds.[2] *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980). U.S. cert. denied, 454 U.S. 816, 102 S.C. 92, U.S. rehearing denied, 102 S.C. 982.

In *Hellenic Lines, Limited v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252(1970), the United States Supreme Court had occasion to reconsider the choice of law test developed in *Lauritzen*, and noted tht the test was neither exhaustive nor to be applied mechanically. The court went on to note that another factor of importance in determining the applicability of the Jones Act was the base of operations of the shipowner. Additionally, the court noted that there may well be other factors important in these considerations. The information sought in appellee's interrogatories could have conceivably brought to light

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[2] In *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the Supreme Court gave the following factors as the important considerations in determining whether a case should be dismissed for forum non conveniens:

1) Relative ease of access to sources of proof
2) Availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses.
3) Possibility of view of premises
4) Enforceability of judgment
5) Other practical problems or considerations.

facts which dispute appellants' allegations that there were no American interest in Cosmar and ultimately in the ISABELLE. It is hard to imagine why appellants would so forcefully resist divulging this information if, as they contend, there were no American interests involved.

Appellants mistakingly rely on *Chiazor v. Transworld Drilling Company, Ltd.*, 648 F.2d 1015 (5th Cir. 1981), U.S. cert. denied 102 S.Ct. 1714, for the proposition that there is no need to look behind the foreign corporate structure where the majority of *Lauritzen-Rhoditis* factors clearly indicate that foreign law is applicable. The court in *Chiazor* noted that the importance of certain of the *Lauritzen-Rhoditis* factors will vary depending on the circumstances of each case. In *Chiazor*, the court distinguished the situation it was faced with, a submersible drilling rig, from that faced by the *Rhoditis* court, a true maritime vessel. Given that we are faced with here, as in *Rhoditis*, a true maritime vessel, we feel the foreign-corporate structure of Cosmar is of significant relevance.

Regardless of why the information requested was withheld, the fact remains that it was withheld in direct disobedience of court orders to produce it. As a result of this, the trial court on May 28, 1982, less than one month prior to trial, pursuant to LSA-C.C.P. art. 1471, imposed the sanction of striking appellants' exceptions of improper venue, lack of jurisdiction, and their defense of application of Greek law. Appellants maintain that the action of the trial court was an abuse of discretion in that the interrogatories were adequately answered. In that we have determined that the information was relevant and discoverable, and further that appellants' answers were not responsive to the specific requests made, we now turn to other concerns necessary to affirm the imposition of the

sanctions.

> "It has long been recognized that a state court, having concurrent jurisdiction with the federal courts as to in personam admirality claims, is free to adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to modify or displace essential features of the substantive maritime law."

Lavergne v. The Western Company of North America, Inc., 371 So.2d 807, 810 (La. 1979). We must, therefore, detrmine if the application of LSA-C.C.P. art. 1471, which provides the state sanctions for failure to comply with discovery in anyway modifies or displaces any essential features of substantive maritime law. We find that it does not. The Louisiana Code of Civil Procedure was patterned after the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 37(b) provides essentially the same sanctions as those found in LSA-C.C.P. art. 1471 and, therefore, the application of the Louisiana article in no way affects substantive maritime law.

In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S.Ct. 2099 (1982), the United States Supreme Court had occasion to consider the application of sanctions under Federal Rule of Civil Procedure 37(b)(2). At 2107 the Court noted:

> "Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular 'claim', which was at issue in the order to provide discovery."

Having noted above that the Louisiana rules of civil procedure were patterned after the federal rules, it is no surprise that LSA-C.C.P. art. 1471 contains the same standards as Federal Rule 37(b)(2).

In *Ireland*, the discovery sought dealt with the issue of whether the court had personal jurisdiction over the defendant. In reviewing the decision of the district court to impose the Rule 37(b)(2) sanction of treating as established the personal jurisdiction over the defendant for failure to comply with discovery, the Supreme Court reached its decision that the sanction was just based on the following four factors: (1) defendants continued delay and obvious disregard of court orders; (2) defendants repeated failure to comply with their agreements regarding discovery orders within the specified time periods; (3) the fact that plaintiff's allegations that the court had personal jurisdiction over defendants were not frivilous, and thus the attempted use of discovery to substantiate the claims was not an abuse of the judicial process; (4) defendants had ample warning that their continued failure to comply with discovery would lead to the sanctions.

When the factors enunciated in *Ireland* are applied to the facts of this case, it becomes apparent that the trial judge's imposition of sanctions was just. First, appellants' continued delay and obvious disregard for court orders is evidenced in the record. Appellee's first set of interrogatories were propounded on November 5, 1980. Appellants were ordered by the court to answer them by September 1, 1981, which they failed to do. Answers were not forthcoming until March 31, 1982, and when the answers were received, many were completely unresponsive or evasive. In fact, appellants never did provide the names and addresses of the ultimate beneficial owners of

Cosmar, as requested in interrogatories 19 and 20.

Second, there can be no doubt that appellants repeatedly failed to comply with their agreements regarding answering the discovery interrogatories within the times specified by the Court and in their formal agreements with counsel for appellee. We feel it unnecessary to list all of the instances in which these agreements were breached, but we note that the September 1, 1981, deadline was not met. Additionally, as noted above, the agreement reached between counsel in open court as reflected by the court minutes of May 7, 1982, was also breached. It was this last breach which directly lead the trial court to impose the sanctions on May 28, 1982, less than one month before the scheduled trial of this matter.

We feel it necessary to note at this point that appellants did not object to the relevancy of these interrogatories until they sought writs on the imposition of the sanctions to this court and to the Louisiana Supreme Court, both of which were denied. The record clearly shows that appellants continually refused to obey court orders and their agreements through counsel.

The third factor in *Ireland*, as it relates to this case, requires a determination of whether appellee's allegations that venue and jurisdiction were proper, along with the allegation that American law was applicable, were frivilous. We find that they were not. As noted earlier in this opinion, the questions which remain unanswered could have had significant influence on this case. We see no abuse of judicial process in attempting to substantiate these claims through discovery.

The last *Ireland* factor to be considered is the

sufficiency of the warning appellants had prior to the sanctions being imposed. Unlike in *Ireland*, the record does not reflect that the trial judge ever actually threatened appellants with the sanctions in so many words. In our opinion however, this does mitigate the fact that appellants had sufficient warning. It should be noted that appellee moved for, and was granted, a preliminary default judgment, which through agreement of counsel was later abandoned. Appellee again brought a motion for default, and alternatively, sanctions, which was forestalled through the intervention of the trial judge in an effort to resolve the discovery dispute between the parties. When appellants breached this open court agreement, appellee brought a third motion for default and alternatively for sanctions. Appellants' counsel, in a letter to appellee's counsel, in fact acknowledged that sanctions were possible stating that he was cognizant of the fact that if his clients did not divulge the information their defenses under Greek law would be lost. We feel the record demonstrates that appellants had sufficient warning, and the imposition of sanctions was just.

The second standard noted by the court in *Ireland*, that the sanction must be specifically related to the particular claim which was at issue in the order to provide discovery has also been met. The intertwined considerations posed by appellants' venue, jurisdiction and choice of law objections, and which appellee was attempting to investigate through discovery are directly related to the sanctions imposed. Therefore, in that both the general and specific standards of LSA-C.C.P. art. 1471 have been met, we find that the sanctions were proper.

As noted earlier in this opinion, Second Officer Volyrakis, who was also injured in the accident, filed suit

in federal district court. Appellants place great emphasis on the fact that that case was transferred to Greece based on forum non conveniens. We do not feel that this case is dispositive of the one before the court because it is distinguishable given the sanctions imposed in this case. Perhaps if discovery had been complied with, the trial judge in this case would have reached the same result as the *Volyrakis* court. The key distinction between these two cases is that appellants lost their right to question venue, jurisdiction, and American law through their knowing and blatant disobedience of valid court orders.

Appellants maintain that without the deposition of Second Officer Volyrakis, which they maintain should not have been allowed into evidence, there is insufficient evidence to affirm the trial court's finding of negligence and unseaworthiness. We disagree.

The deposition was noticed to be taken at the Hilton Hotel in Athens, Greece at 2:30 p.m. on June 1, 1982. It is apparent that a misunderstanding arose as to possible changes in the location of the deposition. Both appellant and appellee put on evidence as to what the actual understanding was, both versions of which differed greatly.

The record reveals that the following took place. Counsel for appellee waited for approximately one-half hour after the scheduled time before beginning because counsel for appellants had not arrived. Counsel for appellants had gone to another hotel, mistakenly believing that the deposition had been changed. Shortly after the deposition had begun, counsel for appellant appeared. Upon entering, counsel for appellant asked to inquire into the qualifications of the court reporter and interpreter. In

that the deposition had begun, counsel for appellee asked that he wait until cross examination for the inquiry. After questioning the reporter, counsel for appellant objected to the use of this reporter on the grounds that she was not qualified under Greek law to administer oaths, and was not qualified in the United States as a court reporter although she had been a free lance foreign reporter for a number of years.

It did not become apparent to counsel for appellant until shortly before trial that the court reporter had not administered the oath, rather, counsel for appellee had administered the oath. Counsel for appellant then moved to suppress the deposition. The motion to suppress was denied. Counsel for appellee testified that he and the court reporter discussed the procedure to be followed, in that the reporters in Greece did not administer oaths and decided that counsel would administer the oath.

In deciding to deny the motion to suppress, the trial judge after hearing the testimony, stated that he felt the proper safeguards had been employed and that it was not in the interest of justice to suppress it. In agreeing that no injustice resulted, we note that by the time counsel for appellant entered the deposition, Mr. Volyrakis had only been asked his name and citizenship. Counsel for appellant was therefore present for essentially the entire deposition to note his objections for the record.

The trial judge, based principally on the expert testimony, found that appellee had met the burden of proof under both Jones Act negligence and general maritime unseaworthiness. A controversy existed in that there were two versions of how the mooring equipment was being used at the time of the accident. The key factor involved in both

versions however was that the stern right winch had been used in conjunction with the fairhead, which according to appellee's experts, was an unsafe procedure. We note that in admirality cases tried before a judge, findings of fact are binding unless clearly erroneous. *Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477 (5th Cir. 1981). We find nothing clearly erroneous in the trial judge's determination.

Appellants next allege that the trial judge erred in not finding that decedent was contributorily negligent. They stress that the experts in this case all testified that it was dangerous to stand inside the "bite" of a line that has tension on it. They further rely on the Volyrakis deposition wherein he states that he warned the crew working under him to stay on the opposite side of the ship. We note, however, that Mr. Volyrakis who was also injured, could not remember the exact moments prior to the accident and stated that the crew was very busy, and thus, decednet may have been just passing by the line when the accident happened. Such questions of proximate cause and contributory negligence are treated as questions of fact in admiralty cases and, thus, subject to the clearly erroneous standard on review. *Kratzer.* We see nothing clearly erroneous in the trial judge's determination that decedent was not contributorily negligent.

We agree with appellant's contention that there is nothing in the record to show any liability on the part of Celestial Maritime Corporation (American agent for the ISABELLE). Under both the Jones Act and general maritime law, the employer of the seaman and the vessel owner may be liable for negligent injury or death, or injury or death resulting from the unseaworthiness of the vessel. *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980). There is simply nothing in the record to in-

dicate that appellant Celestial stood in either of these two capacities.

We do not, however, agree with appellants' argument that judgment cannot be cast against The United Kingdom Steam Ship Assurance Association (Bermuda) Limited (who entered into a protection and indemnity agreement with Cosmar). It has been held that protection and indemnity insurance is subject to the Louisiana Direct Action Statute. *Olympic Towing Corporation v. Nebel Towing Company*, 419 F.2d 230 (5th Cir. 1969), U.S. cert. denied, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396.

Appellants additionally contend that the amount of damages awarded was excessive for several reasons. The trial court awarded damages to the decedent's mother and retarded brother for loss of society and support, plus decedent's pain and suffering, interest thereon from February 2, 1980, and costs.

Appellants first maintain that decedent's retarded brother, who was wholly dependent on him, is not entitled to any award for loss of society or support. This argument is simply without merit. In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9l (1974), the United States Supreme Court noted that a decedent's dependents under the maritime wrongful-death remedy may recover damages for their loss of support and society. There can be no doubt from the record that decedent's brother was dependent on decedent for both society and support.

Appellants next argue that the trial judge erred in his method of computing the loss of support awards. We see nothing clearly erroneous in the method employed by

the trial court. The trial judge stated that he felt that neither of the experts gave unquestionable methods by which to reach a determination, and thus he used portions of each theory in making the awards. The amounts awarded, $53,556.25 to each of the two dependents, are not so high as to be clearly erroneous.

The next argument urged by appellants is that the trial judge abused his discretion in awarding $100,000.00 for decedent's pain and suffering. Appellants maintain that there can be no recovery for unconscious pain and suffering, and that given decedent's condition, he never experienced pain, as we know it. They rely heavily on the testimony of Dr. William A. Fisher, decedent's treating neuro-surgeon, who testified at length as to decedent's condition prior to death. There is, however, evidence in the record which disputes Dr. Fisher's opinions, and which indicates to this court that decedent did, in fact, experience considerable pain prior to his death.

Finally, appellants maintain that the trial judge abused his discretion in awarding prejudgment interest from the date of judicial demand. We see no abuse in this award. As conceded by appellants, it is a matter within the discretion of the trial court.

Therefore, for the foregoing reasons, the judgment of the trial court is affirmed as to appellants, Cosmar Compania Naveria, S.A. and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, and reversed as to appellant Celestial Maritime Corporation.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX "D"

REPORTER'S NOTE: At this time counsel for the plaintiff and counsel for the defense gave their closing arguments.

THE COURT: All right. This case was brought by Symeon Symeonides as the personal representative originally for the person injured in this case, who was injured on the second day of February, 1980. He died on May the 30th, of that same year. And the plaintiff in this case thereafter became the personal representative of his mother and three of his brothers. A question arose during this trial at the end of the plaintiff's case whereby exceptions of no right or cause of actions were filed contesting this plaintiff's right to act in this matter. At the outset, the Court, I guess, is restrained to say that the Federal jurisprudence as is often the case is confusing. It is difficult to wade through the maze of different opinions from the different Circuits involved. There seems to be an uncharted course in this area. One case in particualr that's been cited, the Federal Court said, well, we won't face this issue. We'll just let the other Courts work it out as we go along, which does not give much help to those trying cases day in and day out. Nevertheless, out of all of the maze this Court has got to try to come up with some kind of rules by which trials are handled and what the law is in this particular case. At the outset the Court will say that the Court is of the opinion that the present plaintiff is a proper representative to sue in this case. That exception was referred to the merits and therefore, the Court overrules that exception. The evidence in this case shows that the decedent, Frangiskos—and I'll refer to these people by their first names.—was injured on February the 2nd, 1980, while a member of the crew of the Isabelle, which was moored in

Louisiana. As a result of his injuries he was taken to the Lady of the Lake Hospital where he stayed until the 30th of May, at which time he died, as a result of the injuries which he had originally received. There is some question about his status in so far as his health was concerned during the period that he was hospitalized. The Court will comment on that later. First, the Court must determine whether or not there was liability in the case. Plaintiff seeks recovery from the defendants, the three defendants in this case based upon two theories. One is that under the Jones Act, and the other is under the general maritime law based upon unseaworthiness. The trial has gone on for two days. There has been considerable evidence in this case. Several experts have testified in regard to their opinion as to liability, as to how the accident happened. One person testified by deposition, that being Mr. Manolis V-o-l-y-r-a-k-i-s, who was also injured as a result of this accident at the same time as the decedent in this case. The Court has listened to the testimony. Based upon all of the testimony the Court finds that there was negligence on the part of the defendants, and that also the ship when being used at that time was being used in an unseaworthy manner, and therefore holds there is liability under the negligence theory and the unseaworthiness theory under the law. Based upon that, the Court must determine the amount of damages. The Court holds that there is a possible claims by all of those represented by the plaintiff in this case. The question is, is there any right to damages by all of them, and how much. The Court is sorry that in a case like this that much of the evidence had to be presented by deposition. I in no way wish to impune the honesty or integrity or truthfulness or untruthfulness of anyone who testified in a deposition, but it is the responsibility of the Court to evaluate and weight the testimony. It is extremely difficult to weigh that testimony when the witness is not on the

stand where the Court can observe the witness' demeanor and all of the things that the Court usually does in a case when witnesses testify in person. However, the Court can understand with many of the people being in Greece, the expense involved of interpretation and also the impossibility of getting all of these people together makes it and requires it to be necessary for depositions to be filed in the case. The Court has read all of the depositions. In the assessment of damages the Court must decide the case based upon the Court's appreciation of what the depositions have to say and what they imply. This decedent at the time of his death was twenty-eight years old. The depositions indicate by members of his family that he came from a large family, that at a young age that his sister was put out for adoption, and he and his brothers were placed in an orphanage. After a period in the orphanage, apparently at a very young age he was released to the work force. The Court appreciates the problems that the mother had being apparently a person of few economic means, and the Court is not prejudging her as to putting her children in an orphanage. The only reason that the Court brings that out is that it was testified to in depositions, and the Court is required to evaluate support and loss of society. After this young man began working he apparently became closer to his mother than he had been in his younger life. The Court believes and so finds in this case that apparently of the children he was apparently a good son, because he tried to help his mother and his retarded brother with the family expenses. In reading the depositions of the two brothers who testified by deposition, one of them apparently had not been around the decedent much at all during his life, and has been away from home most of the time. He has worked and is capable of working. And the other one has been around off and on. His deposition does state that he had been in an accident, but that he was waiting to go into the

Army, that he was eight percent disable, and that he was actually able to work. The Court feels from his deposition that if he was not working, it was certainly not because he was unable to, from the point of view of disability. The Court is of the opinion that there should be no recovery by these two brothers for loss of society. So the law says that—in one place where those dependents who are depending upon the decedent for support, there is some indication in the jurisprudence, which the Court again says is confusing, that maybe that support element is not necessary. But in any event, in this case the Court does not find that there was any dependency on the part of those two brothers to the decedent. And in any event, because of their separation through the years and their meeting from time to time, the Court feels that any award for loss of society would not be appropriate as to them. The record does show however by a preponderance of evidence that the mother and the son became closer and she depended upon him in his adult years for some support. The record also shows that apparently this decedent was kind and helpful to his retarded brother, who will apparently be unable to function well in society for the remainder of his life. Although the decedent in this case did work away from home and did go home from time to time, and as a result helped his mother and became closer to her, and also took care of his brother from time to time—The Court feels that the loss of society to the mother, the Court feels that an award of $50,000.00 would be appropriate, to the brother, Georgios, $25,000.00. In regard to support, the two experts in this case testified as to the proper amount of support. The Court has had extreme difficulty in this matter because neither of the experts, as the Court feels, came up with the exact formula that should be awarded in this matter. The plaintiff has strenuously argued first that the award for support should be based upon the amount of his

wages for the remainder of his working life less the—what the head of a household would use for himself. In the alternative plaintiff states that based upon the statement of the brother there was an amount of support of 20,000 in Greek money, drachmas, per month, and in the alternative it goes down to 15,000. The deposition of the mother casts confusion on this. The Court does realize that she would have to talk through an interpreter and as counsel has said, apparently she was somewhat uneducated, but she did say in her deposition in answer to a question, "Well, every month, every two months he would send me 15,000 drachmas to pay the debts, sometimes ten, sometimes fifteen." So we get the statement of ten. We get the statement of fifteen. We get the statement from the brother of twenty. We get the statement that he would from time to time come in and pay some of the bills, that he would from time to time come in and pay for things for the household. He purchased part of a home, and that part of it was paid for by other monies, so the evidence shows. The Court is of the opinion that a preponderance of the evidence would indicate that he would send her approximately 15,000 drachmas sometimes one and sometimes two, which Mr. — the expert for the defendant, Mr. Boudreaux, coined that phrase, which is probably more appropriate as to the amount, how the support should be computed. However, the Court does not agree with the method of computation by Mr. Boudreaux because it anticipates a small sum to be invested with the interest thereon to be used and accumulated. The Court does not see awards such as that, so the Court must improvise with the testimony of Mr. Boudreaux and all of the other witnesses. So the best way the Court could come out with this matter—Dr. Rice testified based upon the 15,000 figure with a work life of the decedent of thirty-two years, had the contribution been 15,000 drachmas per month over his anticipated work life, considering all of the factors

that the economists take into consideration, the present value would be $141,213.00. To institute the one/two factor in there what you must do is subtract the $4,819.00, which gives $136,394.00. Half of that is $68,197.00, add half again of that amount to your figure and then add back the $4,819.00, and you get $107,114.50. The Court in trying to understand the jurisprudence feels that it is in the discretion of the Court to award the support to those based upon the Court's discretion as to how support should be awarded. The Court feels that the decedent in this case by the evidence meant to help the continued establishment of a home for the mother and Georgios, his retarded brother. And as a result of that, the Court feels that the proper award in that regard would be $53,557.25 for the son, Georgios, $53,557.25 for the mother, Evangelia. The last question that the Court must decide is the pain and suffering. Based upon the cases, the Court feels that the jurisprudence indicates—First, the Louisiana Courts indicate that we must use what the Federal law says about the amount of the awards. Second, that we must apportion according to Federal law. Therefore, the Court holds that the pain and suffering would be, whatever it might be, would be distributed to the representative for the benefit of the decedent's estate. The testimony as to pain and suffering, of course, is in conflict. This decedent was brought to the hospital immediately after the accident. He was visited by the representative on a regular basis. The representative being concerned for his well being kept up with him and talked with his nurses and doctors. Dr. Fisher testified in this case that the diagnosis was of a severe nature, and of such that he did not expect the decedent to live. Dr. Fisher testified that there was never any effective prognosis in regard to this defendant, and that neurologically nothing could be done. He stated that there was no conscious awareness of his surroundings, but he did state that

he experienced pain on a very basic primitive level. And as Dr. Fisher said over and over again, he stated that he did not have pain on an intellectual level such as the other people in this courtroom would have. The Court realizes in this case that this decedent, of course, was not hollering and screaming in paid constantly during the four months that he was in the hospital. Yet, this human being was four months hospitalized, experiencing some forms of life, even though they were primitive, and the Court feels that the evidence indicates that there should be an award for pain and suffering in this matter. The Court sets that award at $100,000.00. Therefore, based upon the oral reasons in this case, the Court holds that the plaintiff in this case shall have the right to recover from all three defendants in solido as follows: For Georgios, loss of society, $25,000.00, loss of support, $53,557.25, for a total of $78,557.25. For Evangelia, loss of society, $50,000.00, loss of support, $53,557.25, a total of $103,557.25. Pain and suffering to the estate of the decedent, $100,000.00. A total award of $282,114.50, with legal interest thereon from February 2nd, 1980, until paid. The defendants to pay cost. Expert witness fees are set in the following amounts: Richard Chase, $900.00. Dr. William Fisher, $100.00. Dr. Don Bowers, $100.00. George Blann, $675.00. Andrew McPhate, $600.00. Randolph Rice, $600.00. Ugo Castagnetti, $1,000.00. Kenneth J. Boudreaux, $1,000.00. Judgment will be signed accordingly.

Adjourn Court until 9:30 tomorrow morning.

END OF TRIAL

NUMBER: 235,894 DIVISION "B"

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

SYMEON SYMEONIDES, ETC., ET AL

VERSUS

COSMAR COMPANIA NAVIERA, S.A., ET AL

JUDGMENT

This matter came on for trial on the merits on June 21 and 22, 1982.

Present: John W. deGravelles and Paul H. Due', Due', Dodson, deGravelles, Robinson & Caskey, 442 Europe Street, Baton Rouge, Louisiana 70802, attorneys for plaintiff, Symeon Symeonides, as personal representative of the estate of the decedent, Frangiskos Hajigeorgiou;

Harvey G. Gleason and J. Dwight LeBlanc, Jr., Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First N.B.C. Building, New Orleans, Louisiana 70112, attorneys for defendants, Cosmar Compania Naviera, S.A., Celestial Maritime Corp., and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited.

After hearing the pleadings, evidence, and arguments of counsel, the Court considering the law and the evidence to be in favor of the plaintiff, Symeon Symeonides, as personal representative of the estate of the decedent, Frangiskos Hajigaeorgiou, and against the

defendants, Cosmar Compania Naviera, S.A., Celestial Maritime Corp., and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, for the reasons this day orally assigned.

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of the plaintiff, Symeon Symeonides, as personal representative of the estate of the decedent, Frangiskos Hajigeorgiou, and against the defendants, Cosmar Compania Naviera, S.A., Celestial Maritime Corp., and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, for the benefit of Evangelia-Eleutheria Hajigeorgiou, in the principal amount of FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS for loss of society resulting from the death of Frangiskos Hajigeorgiou and in the amount of FIFTY-THREE THOUSAND FIVE HUNDRED FIFTY-SEVEN AND 25/100 ($53,557.25) DOLLARS for the loss of support from Frangiskos Hajigeorgiou, for a total of ONE HUNDRED THREE THOUSAND FIVE HUNDRED FIFTY-SEVEN AND 25/100 ($103,557.25) DOLLARS.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of the plaintiff, Symeon Symeonides, as personal representative of the estate of the decedent, Frangiskos Hajigeorgiou, and against the defendants, Cosmar Compania Naviera, S.A., Celestial Maritime Corp., and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, for the benefit of Georgios Hajigeorgiou, in the principal amount of TWENTY-FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS for loss of society resulting from the death of Frangiskos Hajigeorgiou and in the amount of FIFTY-THREE THOUSAND FIVE HUNDRED FIFTY-

SEVEN AND 25/100 ($53,557.25) DOLLARS for the loss of support from Frangiskos Hajigeorgiou, for a total of SEVENTY-EIGHT THOUSAND FIVE HUNDRED FIFTY-SEVEN AND 25/100 ($78,557.25) DOLLARS;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of the plaintiff, Symeon Symeonides, as personal representative of the estate of the decedent, Frangiskos Hajigeorgiou, and against the defendants, Cosmar Compania Naviera, S.A., Celestial Maritime Corp., and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, for the benefit of the Estate of Frangiskos Hajigeorgiou, in the principal amount of ONE HUNDRED THOUSAND AND NO/100 ($100,000.00) DOLLARS, for pain and suffering of Frangiskos Hajigeorgiou;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendants, Cosmar Compania Naviera, S.A., Celestial Maritime Corp., and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, pay legal interest on all principal amounts enumerated hereinabove from February 2, 1980 until paid;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of the plaintiff, Symeon Symeonides, as personal representative of the estate of the decedent, Frangiskos Hajigeorgiou, and against the defendants, Cosmar Compania Naviera, S.A., Celestial Maritime Corp., and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, for all costs of these proceedings, including expert witness fees, which are assessed as follows: Richard Chase, $900.00; William Fisher, M.D., $100.00; Donn Bowers, M.D., $100.00; George Blan, $675.00; A. J. McPhate,

$600.00; G. Randolph Rice, Ph.D., $600.00; Captain Ugo Castagnetti, $1,000.00; and Kenneth Boudreaus, $1,000.00.

Judgment rendered in Open Court on the 22nd day of June, 1982, at Baton Rouge, Louisiana.

Judgment signed on this 28th day of June, 1982, at Baton Rouge, Louisiana.

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JUDGE, 19TH JUDICIAL DISTRICT COURT

APPENDIX "E"

[668 F.2d 863]

Manolis VOLYRAKIS,

Plaintiff-Appellees.

v.

M/V ISABELLE, et al.,

Defendants-Appellees.

No. 81-3049
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 26, 1982.

James M. Boone, Folsom, La., for plaintiff-appellant.

Chaffe, McCall, Phillips, Toler, Sarpy, Harvey G. Gleason, New Orleans, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

Manolis Volyrakis, a seaman, filed suit against various defendants under the Jones Act, 46 U.S.C. § 688,

for injuries he sustained while working on a vessel. The trial court granted motions to dismiss and motions for summary judgment sought by the defendants. Volyrakis notices an appeal as relates to all defendants but prosecutes his appeal only as against the owner of the vessel and the vessel's agent. Finding no error in the trial court's rulings, we affirm.

Context Facts

Volyrakis, a Greek citizen, was injured while working as a member of the crew of the M/V ISABELLE, then located near New Orleans. The ISABELLE is of Greek registry and is owned by Cosmar Compania Naviera, S.A., a Panamanian corporation. The directors and officers of Cosmar are Greek citizens; no Cosmar shareholder is a citizen or resident of the United States. Cosmar has no office in the United States. Since her purchase by Cosmar, the ISABELLE had made three trips to the United States.

Celestial Maritime Corporation, a New York corporation, serves as an agent for the vessel. The function of Celestial was described by its president, Theofilos A. Vatis, as follows:

> We are agents and brokers for oceangoing vessels; that is, we negotiate cargoes and periods of employment on behalf of shipowners from which activity we derive commission income and, in addition, we supply supervisory and agency services to vessels and other related services, be it in insurance areas or other operational areas, and from this we derive income on a retainer basis.

Celestial has no ownership interest in the ISABELLE, and

is not the only company that seeks business for her. Celestial has no control over the hiring of crewmembers and makes no decisions regarding the operation of the vessel.

Volyrakis filed suit against the ISABELLE, against Cosmar, Cosmar's P & I insurer, The United Kingdom Mutual Steam Ship Assurance Association, Ltd., and against Celestial. Also named as defendants were Filia Maritime Agency, S.A., a Greek maritime agency which provided crew and other services to the ISABELLE, and Sunrise Shipping Agency, Inc., a New Orleans "protective" agent employed by Cosmar to assist the ISABELLE with its local needs. The court granted Celestial's motion for summary judgment, finding that Celestial was not a proper Jones Act defendant. The court granted Cosmar's motion to dismiss for reasons of forum non-conveniens after concluding that the Jones Act was not the proper law to apply to the case. The court also granted United Kingdom's motion to dismiss and granted summary judgment in favor of Sunrise Shipping and Filia.[1]

I. *Celestial's Jones Act Employee Status*

Volyrakis argues that summary judgment in favor of Celestial was improper because there were contested

[1] Volyrakis has waived any error in the dismissal of Sunrise and Filia by failing to prosecute his claims against them on appeal. Federal Rule of Appellate Procedure 28(a)(4) requires that appellant's brief contain an argument setting forth appellant's reasons and contentions. Appellant's brief here states only that "Reversal is further urged as to Sunrise and Filia to enable plaintiff to adjudicate fully all factual matters related to each of them in the controversy." This is insufficient to preserve the issue of their dismissal on appeal. *Larkin v. United Association of Journeymen*, 338 F.2d 335 (1st Cir. 1964), *cert. denied*, 380 U.S. 975, 85 S.Ct. 1337, 14 L.Ed.2d 270 (1965).

material facts as to whether Celestial was his "employer" for purposes of Jones Act liability.

Summary judgment is appropriate where it appears from the pleadings, depositions, admissions, and affidavits, considered in the light most favorable to the non-moving party, that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Cubbage v. Averett*, 626 F.2d 1307 (5th Cir. 1980). When the moving party has properly supported his summary judgment motion, the non-moving party must come forward with "significant probative evidence" showing that there is an issue regarding material facts. *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 114 (5th Cir. 1978). The non-movant may not simply rely on "vague assertions that additional discovery will produce needed, but unspecified facts...." *S.E.C. v. Spence & Green*, 612 F.2d 896 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082, 101 S.Ct. 866, 66 L.Ed.2d 806 (1981).

In the present case there is no dispute about the proper legal standard to be applied. The express language of the Jones Act requires that an employer-employee relationship exist before liability may be imposed. *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975), *clarified*, 546 F.2d 675 (5th Cir. 1977). As we stated in *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980):

> A Jones Act claim ... requires proof of an employment relationship either with the owner of the vessel or with some other employer who assigns the worker to a task creating a vessel connection ....

The employer need not be the owner of the vessel, *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972), and independent contractors may be liable under the Act. *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d at 452; *Mahramas v. American export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973). Further, a third person who borrows a worker may become the employer if the borrowing employer assumes sufficient control over the worker. *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969). Control is the critical inquiry.

Factors indicating control over an employee include payment, direction, and supervision of the employee. Also relevant is the source of the power to hire and fire. The control which is exercised must be substantial; the mere possibility of some control over the actions of an employee will not suffice to find an employer-employee relationship. *Guidry*, 614 F.2d at 455.

In the present case, Celestial was merely an agent for the ISABELLE. The uncontroverted facts indicate that, although Celestial did perform some general duties for the vessel, it exercised no control over her master and crew. Celestial was not responsible for the hiring of crewmen; this was done by a company in Piraeus, Greece. Celestial had no power to fire and made no decisions concerning the deployment and supervision of the crew. Celestial's absence of control over the vessel is reflected in Clause 2 of the General Authority section of the agency contract between Celestial and the ISABELLE, which states:

> Nothing in this Agreement is to be construed as giving the Agent [Celestial] control or possession of the Vessel or having any interest whatever in the business, profits, or liabilities resulting from

the operation of the vessel.

In light of the foregoing, and considering appellant's failure to present any probative evidence indicating a conflict in material facts, we find that the trial court's grant of summary judgment in favor of Celestial was correct and affirm.

II. *Cosmar's Motion to Dismiss*

The trial judge granted Cosmar's motion to dismiss based on forum non-conveniens, concluding the Jones Act was inapplicable. We agree.[2]

Whether the Jones Act applies to a given set of facts involves a question of choice of law. The Supreme Court directly addressed this issue in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970).

In *Lauritzen*, the injured seaman was Danish, the ship was registered under the Danish flag, and the owner of the ship was Danish. The ship's articles were written in Danish and provided that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union, of which Larsen was a member. Larsen's injury occurred while the vessel was in the Havana harbor. On these facts, the Supreme

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[2] In its recent decision in *Piper Aircraft Company v. Reyno*, __ U.S. __, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), the Supreme Court reexamined the doctrine of *forum non conveniens* in light of its holding in *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

Court held that the trial court erred in applying the Jones Act to the case. The Court listed the following seven factors as relevant in resolving the choice of law question: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured seaman; (4) place of the contract; (5) allegiance of the defendant shipowner; (6) inaccessibility of a foreign forum; and (7) law of the forum.

In *Rhoditis*, the injured seaman was a Greek citizen, the vessel was of Greek registry, the vessel's owner was a Greek corporation and the articles, which were signed in Greece, provided that Greek law and a Greek collective bargaining agreement applied and that all claims arising out of the employment contract were to be adjudicated by a Greek court. The injury occurred while the vessel was in United States waters. In affirming the trial court's application of the Jones Act to these facts, the Supreme Court first noted that the *Lauritzen* test was not a mechanical one, and the list of seven factors was not exhaustive. The Court held that the shipowner's "base of operations" was another important factor in determining whether the Jones Act was applicable. The Court found that Hellenic Lines, although a Greek corporation, actually based its operations in the United States. The Court predicated its conclusions on several facts: (1) Hellenic had its largest office in New York; (2) it had another office in New Orleans; (3) 95% of Hellenic Lines' stock was owned by a Greek citizen who had resided in the United States for 25 years; and (4) this United States resident managed the corporation out of the New York office. The Court also found relevant the fact that the vessel on which the seaman was injured engaged in regularly scheduled runs between various ports in the United States and the Middle East, Pakistan, and India, and that the entire income earned by the vessel was from cargo either originating or terminating in the United

States.

In balancing the *Lauritzen* factors with these additional considerations the Supreme Court concluded:

> We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act "employer." The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country.

398 U.S. at 310, 90 S.Ct. at 1734.

In the present case, the *Lauritzen* factors strongly favor the application of Greek law. The vessel sails under the Greek flag, Volyrakis is a Greek citizen, Cosmar is a Panamanian corporation owned and managed by Greeks, a Greek forum is not inaccessible, and the contract of employment selected Greece as the forum for resolution of all disputes arising out of the employment relationship.[3]

[3] Although it is conceded that this factor carries little weight on the choice of law scale when dealing with seamen's employment contracts due to the disparity in bargaining power between seaman and employer, *Fisher v. Agios Nicholaos V*, 628 F.2d 308 (5th Cir. 1980); 1 G. Gilmore & C. Black, The Law of Admiralty, 476 (2d ed. 1975), it is nonetheless one factor to be considered.

That the injury occurred in United States waters is the sole factor in favor of applying United States law. This fact alone is not enough. As the Supreme Court stated in *Lauritzen:*

> The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the variety of legal authority over waters she may navigate. These range from ports, harbors, roadsteads, straits, rivers and canals which form part of the domain of various states, through bays and gulfs, and that band of the littoral sea known as territorial waters over which control in a large, but not unlimited degree is conceded to the adjacent state.

345 U.S. at 583, 73 S.Ct. at 928.

Volyrakis argues that, notwithstanding the lack of contacts under *Lauritzen*, application of the Jones Act is proper because Cosmar has a substantial base of operations in the United States. Outside of assertions in Volyrakis' brief that are not supported by the record,[4] the only connection that Cosmar has with the United States is through Celestial. Considering the evidence in the light most favorable to Volyrakis, the non-mover, the record reflects that a Greek citizen, Phostiropoulos, is the president of Cosmar and has an ownership interest. Phostiropoulos is the representative of Mikofo, a Liechtenstein corporation which owns 49% of the stock in

[4] Appellant states in his brief that Cosmar is headquartered in New York, that Cosmar's president, Phostiropoulos, has an office in New York, and that Cosmar's New York office was responsible for hiring and firing crewmembers. There is no evidence whatsoever in the record to support these allegations.

Celestial; he is also one of the three directors of Celestial. This is not sufficient to constitute a substantial base of operations. Celestial is not the alter ego of Cosmar. The two corporations are independent entities engaging in related business activities. Celestial is merely an agent of the ISABELLE, assisting the vessel by obtaining supplies, arranging charters, and procuring contracts for cargo. Based on these connections, we cannot say that Cosmar has a substantial base of operations in the United States.

Volyrakis' reliance on the Second Circuit's decision in *Antypas v. Cia. Maritime San Basilio, S. A.*, 541 F.2d 307 (2d Cir. 1976), is misplaced; that case is factually different. In *Antypas*, the owner of the vessel was a Panamanian corporation, the entire stock of which was owned by United States citizens. In addition, during 1972 the vessel on which the seaman was injured operated alternatively on two liner services, one from the United States to Europe and back and the other from the United States to the Far East and back. The operation of the vessel was conducted by a New York corporation, all of the stock of which was owned by American citizens. Although there were other connections which, considered together, led the Second Circuit to conclude that the Jones Act applied, the foregoing facts differentiate *Antypas* from the case now before us.

Volyrakis also relies heavily on our recent decision in *Fisher v. Agios Nicholaos V*, 628 F.2d 308 (5th Cir. 1980). In *Fisher*, the seaman was a citizen of Greece, he was hired in Greece, the vessel was registered in Greece, and it was owned by Valsley Maritime, Ltd., a Liberian corporation. The vessel was operated by a Panamanian corporation. The seaman was killed while fighting a fire on the vessel as it was docked in Beaumont, Texas. We held that, although the vessel owner made a strong case for the application of

Greek law, the trial court could apply the Jones Act to the case since the vessel had a substantial base of operations in this country. We noted the following considerations: (1) the vessel at issue was the only vessel owned by defendant; (2) after its purchase, the vessel proceeded directly from Spain to the United States without a cargo; (3) the vessel's first cargo voyage under her new owner was to carry corn from Beaumont to the Soviet Union; and (4) the vessel was purchased for the purpose of that trade. We distinguished *Fisher* from previous decisions because the vessel's "entire business activity prior to the accident" was in the United States. *Id.* at 318. The *Fisher* decision is inapplicable to appellant's case.

The mere fact that a vessel periodically visits this country is not enough to merit application of the Jones Act. That point was considered by the Supreme Court in *Lauritzen v. Larsen*, where, in rejecting the very argument that appellant advances here, the Court stated:

> Respondent places great stress upon the assertion that petitioner's commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality .... Maritime law, like

> our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

345 U.S. at 581-82, 73 S.Ct. at 928.

The trial court correctly concluded that the Jones Act was inapplicable. The judgment of the trial court is, in all respects, AFFIRMED.